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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

United States of America,	) CR 05-316-DSF
	)
Plaintiff.	) <b>MOTION OF DEFENDANT RICHARD</b>
	) <b>LEONARD TO RECONSIDER THE</b>
vs.	) <b>COURT'S RESTITUTION ORDER AND</b>
	) <b>TO CORRECT SENTENCE</b>
<b>RICHARD LEONARD</b>	)
	)
Defendant.	) Date: N/A
	) Time: N/A
	) Place: N/A
	)
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	)
	)
	)

**MOTION**

Defendant Richard B. Leonard ("Mr. Leonard") hereby moves for reconsideration of the Court's order of restitution entered on April 26, 2010. Mr. Leonard moves for reconsideration pursuant to Federal Rule of Criminal Procedure 35(a), which permits parties to move for reconsideration of sentence and allows courts to correct sentencing orders within 14 days of entry. See United States v. Barragan-Mendoza, 174 F.3d 1024, 1026 (9th Cir. 1999). The filing of a motion to reconsider and

1 correct sentence suspends the 10 day deadline within which  
2 parties must file a notice of appeal. Id.

3 By relying solely on Revenue Agent Jean Pugh's testimony at  
4 the restitution hearing, despite previously agreeing to grant  
5 immunity to Coast Rican Attorney Arnoldo Tinoco Andre ("Mr.  
6 Tinoco"), the government did not prove that it had done its best  
7 to discover, and exclude, all non-income items from the  
8 reconstituted income. Because the government failed its burden  
9 at the restitution hearing, the Court should modify the  
10 restitution order, imposed as part of sentencing, and decline to  
11 order restitution other than that Mr. Leonard conceded that he  
12 owes.

13 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**  
14 **APPLICATION TO RECONSIDER RESTITUTION ORDER AND CORRECT SENTENCE**

15 **I.**

16 **FACTS**

17 Throughout the pleadings related to restitution, Mr. Leonard  
18 has complained of his lack of access to Mr. Tinoco as a means by  
19 which to refute some of the government's attribution of income to  
20 Mr. Leonard personally and to attribution of income to other co-  
21 conspirators. (See, e.g., Response of Defendant Richard Leonard  
22 to Government's Memorandum Regarding Restitution, docket entry  
23 774, at p. 5; Supplemental Sentencing Position Memorandum of  
24 Defendant Richard Leonard Regarding Restitution Filed Under Seal,  
25 docket entry 777, at pp. 8-10).

26 After considerable briefing, the Court conducted a  
27 restitution hearing regarding Mr. Leonard on January 11, 2010.  
28 At the outset of that hearing, Mr. Leonard requested a

1 continuance because of his lack of access to Mr. Tinoco. The  
2 Court denied Mr. Leonard's request. At the hearing, IRS Revenue  
3 Agent Pugh testified that she calculated Mr. Leonard's tax  
4 liability using a modified bank deposit method. She testified  
5 that she never spoke with Mr. Tinoco or anyone else at Mr.  
6 Tinoco's office regarding Mr. Leonard's tax issues. At the  
7 conclusion of the hearing, the Court took the matter under  
8 advisement.

9 On April 19, 2010, counsel for Mr. Leonard received notice  
10 from the government that the government had promised immunity to  
11 Mr. Tinoco by letter dated December 8, 2009 (the "December 2009  
12 Immunity Letter"). (See Declaration of Counsel, attached hereto,  
13 at ¶ 2). A copy of the December 2009 Immunity Letter is attached  
14 as Exhibit A to the Declaration of Counsel. Pursuant to the  
15 terms of that immunity understanding, the government apparently  
16 interviewed Mr. Tinoco on February 17, 2010. (Id. at ¶ 3). That  
17 interview was memorialized in a Memorandum of Interview (the  
18 "February 2010 MOI"), which is attached as Exhibit B to the  
19 Declaration of Counsel. In the interview, which apparently  
20 focused primarily on cooperating defendant Michael Putnam, Mr.  
21 Tinoco confirmed how he created Costa Rican corporations, foreign  
22 trusts, etc., for use by his clients, presumably including Mr.  
23 Leonard, to hold and protect assets. (See Exhibit B to  
24 Declaration of Counsel at ¶¶ 11-18).

25 Revenue Agent Pugh was not present for the interview of Mr.  
26 Tinoco in February 2010. Apparently, neither Mr. Leonard's tax  
27 issues nor the tax issues of other defendants, other than perhaps  
28 Mr. Putnam, were discussed.

1 On April 19, 2010, counsel for Mr. Leonard forwarded the  
2 December Immunity Letter and the February MOI to Mr. Leonard.  
3 (Declaration of Counsel at ¶ 4). Mr. Leonard and counsel  
4 exchanged voice messages during the week, finally speaking by  
5 phone on Friday, April 23, 2010. (Id.). During that  
6 conversation, Mr. Leonard authorized counsel to file a  
7 supplemental memorandum alerting the Court to the existence of  
8 the December Immunity Letter and the February 2010 MOI. (Id.).

9 On Monday, April 26, 2010, the Court entered an order  
10 setting the restitution amount at \$2,915,427.16. As part of the  
11 Order the Court noted that, in assessing Mr. Leonard's tax  
12 liability, the United States government had performed the best  
13 analysis it could have performed under the circumstances. Mr.  
14 Leonard seeks reconsideration and correction of that Order.

## 15 II.

### 16 ARGUMENT

17 Federal Rule of Criminal Procedure 35(a) permits courts to  
18 correct a sentence resulting from clear error within 14 days of  
19 imposition of sentence. Former Rule 35(c) only permitted courts  
20 to correct a sentence within seven days of sentence imposition.  
21 In 2009, however, Rule 35 was modified to permit courts to  
22 correct sentences within fourteen days of imposition because "of  
23 the increased complexity of the sentencing process." Fed. R.  
24 Crim. P. 35(a), Advisory Committee's Notes to 2009 Amendments.  
25 The Ninth Circuit has recognized that parties may move for  
26 reconsideration of a sentencing order, and ask courts to correct  
27 sentence pursuant to Rule 35. United States v. Barragan-Mendoza,  
28 174 F.3d 1024, 1026 (9th Cir. 1999).

1 The filing of a motion to reconsider and correct sentence  
2 suspends the 10 day deadline within which parties must file a  
3 notice of appeal. Id. The district court, however, does not  
4 lose jurisdiction even if an appeal is filed prior to expiration  
5 of the fourteen day period. Fed. R. App. P. 4(b)(5); see also  
6 Fed. R. Crim. P. 35(a), Advisory Committee's Notes to 2009  
7 Amendments. Rule 35 "is intended to allow a district court to  
8 modify a sentence only in very limited instances and not merely  
9 to 'reconsider' sentencing issues." United States v. Aguirre,  
10 214 F.3d 1122, 1126 (9th Cir. 2000) (quoting Barragan-Mendoza,  
11 174 F.3d at 1028).

12 In Aguirre, two days after oral imposition of sentence, the  
13 district court issued an order reducing defendant's guideline  
14 sentence because the court failed to consider that the absence of  
15 a local women's prison facility would make family visitation  
16 difficult. On appeal, the Ninth Circuit recognized the power of  
17 the district courts to correct sentences, but concluded that the  
18 failure to consider the unavailability of a local women's prison  
19 facility did not constitute clear error under Rule 35. "The  
20 original sentence was not based on the availability of local  
21 prison housing. Indeed, the defense did not ask for a departure  
22 on this basis, but only for a recommendation as to local housing  
23 after the district court had already imposed the sentence."  
24 Aguirre, 214 F.3d at 1126.

25 In this case, unlike Aguirre, the failure of the government  
26 to produce Mr. Tinoco for the restitution hearing, or to agree to  
27 the defense request to continue the restitution hearing, or to  
28 even interview Mr. Tinoco regarding Mr. Leonard's restitution

1 issues prior to the hearing - even though the government had  
2 agreed to grant Mr. Tinoco immunity a month before the hearing -  
3 deprived Mr. Leonard of the opportunity to meaningfully defend  
4 against the government's restitution calculations. Unlike the  
5 defendant in Aguirre, throughout his restitution pleadings, Mr.  
6 Leonard complained that the absence of Mr. Tinoco deprived Mr.  
7 Leonard of the opportunity to meaningfully defend himself and  
8 asked the Court to decline to award the restitution amount sought  
9 by the government for that reason. Mr. Leonard even requested a  
10 continuance of the restitution hearing in hopes of gaining access  
11 to Mr. Tinoco.

12 The government used a modified bank deposit method to  
13 calculate Mr. Leonard's reconstituted income for restitution  
14 purposes. As such the government bore the "overall burden to  
15 prove that it has done the best it can to discover, and exclude,  
16 all non-income items from the reconstituted income." United  
17 States v. Stone, 770 F.2d 842, 845 (9th Cir. 1985) (quoting  
18 United States v. Morse, 491 F.2d 149, 154 (1st Cir. 1974). "The  
19 critical question is whether the government's investigation has  
20 provided sufficient evidence to support an inference that an  
21 unexplained excess in bank deposits is attributable to taxable  
22 income." Stone, 770 F.2d at 844-45. "[W]here relevant leads are  
23 not forthcoming, the Government is not required to negate every  
24 possible source of nontaxable income, a matter peculiarly within  
25 the knowledge of the defendant." Id. "The adequacy of a bank  
26 deposits investigation necessarily turns on its own  
27 circumstances." Id. at 845.

1 Unlike the typical taxpayer Mr. Leonard relied completely on  
2 Mr. Tinoco to create legal entities to protect Mr. Leonard's  
3 assets. In the February 2010 MOI, Mr. Tinoco explained, in basic  
4 terms, how this was done. This explanation is consistent with  
5 Mr. Leonard's understanding of what was done on his behalf. (See  
6 Supplemental Sentencing Position Memorandum of Defendant Richard  
7 Leonard Regarding Restitution Filed Under Seal, docket entry 777,  
8 at pp. 8-10). In its February 2010 interview, however, the  
9 government never followed up with Mr. Tinoco regarding the tax  
10 consequences in the United States from the actions taken by Mr.  
11 Tinoco on behalf of Mr. Leonard or any of his other clients, the  
12 tax liability of many of whom the government is also trying to  
13 collect from Mr. Leonard as resitution. The February 2010 MOI  
14 simply notes that Mr. Tinoco advised his clients to "check with  
15 their advisors in the United States," although the February 2010  
16 MOI does not indicate that Mr. Tinoco was referring to taxes when  
17 he so advised his clients. (See February 2010 MOI at ¶ 31).

18 Because Mr. Tinoco completely controlled whatever income  
19 items were attributable to Mr. Leonard, Mr. Leonard, unlike the  
20 typical taxpayer, was completely dependent on Mr. Tinoco in  
21 assessing whether he had legitimate defenses to some or all of  
22 the income items attributed to Mr. Leonard by Revenue Agent  
23 Pugh.

24 The failures of the government also deprived the Court of a  
25 more meaningful basis on which to impose restitution. Because  
26 the government did not produce Mr. Tinoco for the restitution  
27 hearing, or even interview him concerning Mr. Leonard's  
28

1 restitution issues, a restitution order that does not account for  
2 the government's failures is clearly erroneous.

3 **III.**

4 **CONCLUSION**

5 By relying solely on Revenue Agent Jean Pugh's testimony at  
6 the restitution hearing, despite previously agreeing to grant  
7 immunity to Coast Rican Attorney Arnolando Tinoco Andre ("Mr.  
8 Tinoco"), the government did not prove that it had done its best  
9 to discover, and exclude, all non-income items from the  
10 reconstituted income. Because the government failed its burden  
11 at the restitution hearing, the Court should modify the  
12 restitution order, imposed as part of sentencing, and decline to  
13 order restitution other than that Mr. Leonard conceded that he  
14 owes.

15 Dated: May 5, 2010

Respectfully submitted,  
LAW OFFICE OF STEPHEN G. FRYE

17  
18 By: \_\_\_\_\_/s/\_\_\_\_\_  
Stephen G. Frye  
19 Attorney for RICHARD LEONARD  
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